IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.325 OF 1982

1. Deoji Bhiku Dhore
(since deceased by his heirs)
1A. Smt.Champabai Deoji Dhore
(abated vide court's order dt.18-6-2004)
1B. Shri Patil Bau Deoji Dhore

2. Nivrutti Narayan Dhore
(since deceased by his heirs)
2A. Smt.Sulochana Nivrutti Dhore
2B. Anita Nivrutti Dhore
2C. Manisha Nivrutti Dhore
2D. Vishal Nivrutti Dhore
2E. Ganesh Nivrutti Dhore
3. Dnyanoba Narayan Dhore
3A.Smt.Suman Dnaynoba Dhore
3B.Sou.Sangita Suremder Aher
3C.Sou. Sheela Rajendra Aher
3D.Mangala Arun Khalkar
3E.Sunita Deepak Thite
3F.Prakash Dnyanoba Dhore ...Appellants

Vs.

1.Genubhau Gopala Dhore
(since deceased by his heirs)
1A. Gangubai Genubhau Dhore
1B.Kisan Genubhau Dhore
(i) Tanhabai Kisan Dhore
(ii) Vimal Changdeo Thorat
(iii)Leela Balasaheb Balgude
(iv) Mangal Dattatraya Gore
1C. Tukara Genubhau Dhore
1D. Sudam Genubhau Dhore
1E. Indu Keshav Kawade
1F. Watsala Shivahari Hande
1G. Sindhu Narayan Baighare
1H. Babasaheb Genubhau Dhore
(since deceased by his heirs)
a) Shakuntala Babasaheb Dhore
b) Pravin Babasaheb Dhore
c) Deepak Babasaheb Dhore
d) Sanjay Babasaheb Dhore
e) Raju Babasaheb Dhore
(minor by his natural guardian mother
Shakuntala Babasaheb Dhore)

2. Dattoba Gopal Dhore
(since deceased by his legal heirs)
2(i) Smt.Prabhavati Tarachand Dhore
2(ii) Bhalchandra Tarachand Dhore
2(iii)Purushottam Tarachand Dhore
2(iv) Smt.Shakuntala Harashchandra Dhankude
2(v) Sangita ankush Kawade
2(vi) Vijay Tarachand Dhore ...Respondents

Shri Makrand Adkar with Shri P.B.Shah and Shri S.R.Ganbavale for the Appellants.

Shri V.B.Naik for Respondent Nos.1(B)(i) to 1(B)(iv), 1(C), 1(D), 1(H-a) to 1(H-e), 2(i) to 2(vi).

CORAM: ABHAY S.OKA,J.

DATE OF HEARING OF LAST ARGUMENTS:SEPTEMBER 2,2004

DATE OF PRONOUNCEMENT OF JUDGMENT:21ST OCTOBER 2004.

JUDGMENT :

1. On 19th July 1982 this Second Appeal was admitted by passing following order :

> . "The appeal admitted. The substantial question of law is that the question of law arising directly in the suit and the appeal is covered by the Full Bench Judgment of this court reported in 79 B.L.R. P.234. The effect of the said judgment seems to have been over-ruled by the lower appellate court. In fact, my attention was also invited by Mr.Dalvi to the recent judgment of the Supreme Court reported in A.I.R.1982, S.C. P.887 which confirmed the view taken by the Full Bench of this Court."

2. By Judgment and Order dated 7th October 1995 this Appeal was finally decided. The said Judgment and Order of this Court was challenged by the Respondents by preferring Civil Appeal No.1654 of 1997 in the Apex Court. By Order dated

23rd July 2003 the Apex Court remanded the Second Appeal to this Court by recording that this Court had not formulated any substantial question of law.

3. On 30th August 2004 I have heard the learned Counsel Shri Makrand Adkar on behalf of the Appellants. During the course of his submission he invited my attention to the order dated 19th July 1982. He submitted that the following substantial questions of law arise in the Second Appeal:

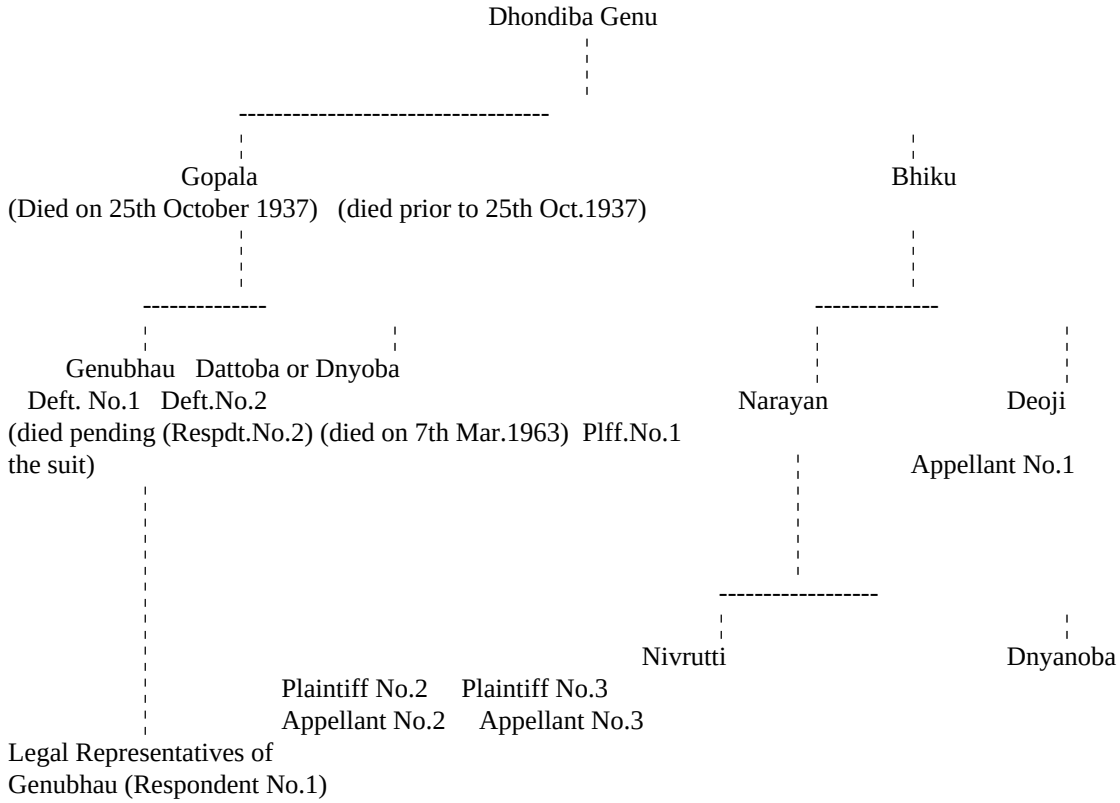
1. Whether the Respondent No.1 became exclusive owner of the suit land even after abolition of Watan by applying the Rule of Primogeniture ?

2. Whether after the abolition of inam the lineal primogeniture stood extinguished and after the regrant of the land it became the property of Joint Hindu Family held by the Respondent No.1 for and on behalf of the members of the family ?"

4. I accordingly indicated to the Counsel appearing for the parties that I propose to hear the Second appeal on the aforesaid substantial question of law by exercising power under the proviso to Sub Section 5 of Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as said Code). Perusal of the Judgments of the Courts below and especially paragraph No.12 of the Appellate Court Judgment clearly show that aforesaid substantial questions of law arise in the Second Appeal. I have accordingly heard the Counsel appearing for the parties on the said substantial questions of law.

5. With a view to appreciate the submissions made by the Counsel appearing for the parties it is necessary to refer to the facts of the case.

6. The Appellants are the original Plaintiffs and the Respondents are the original Defendants. The genealogy of the parties is as under :



7. The case of the Appellants is that there was a partition effected of the joint family properties between the deceased Gopala, Narayan Bhiku Dhore and the Appellant No.1 Deoji

Bhiku Dhore. In the said partition Gopala was allotted one half share and Narayan and the Appellant No.1 received remaining one half share. The suit land is the agricultural land bearing survey No.66 situated at village Sangvi, Taluka Haveli, District Pune. The case of the Appellants is that the suit land was a Watan land and therefore it was not subject matter of the aforesaid partition. The case of the Appellants is that name of Respondent No.1/Defendant No.1 Genubhau was muted in revenue record in respect of suit land after demise of Gopala as he was the elder son of deceased Gopala. Deceased Gopala was the elder brother of Bhiku. Bhiku predeceased Gopala. The case of the Appellants is that the Appellants are entitled to one half share in the suit land.

8. The case of the Appellants is that by virtue of The Maharashtra Revenue Patels (Abolition of Office) Act, 1962 (herein after referred to as the said Act) which was brought into force with effect from 1st January 1963, the Watan was abolished and on or about 9th April 1966 the suit land was regranted on old tenure in favour of the family of the Appellants and the Respondents. The Appellants by notice dated 4th May 1971 called upon the Respondents to hand over separate possession of one half share of the Appellants in the suit land. By sending a reply to the said notice the Respondents declined to hand over the share of the Appellants in the suit land and therefore the present suit was filed.

9. The suit was resisted by the Respondents by filing separate written statements. The Respondent No.1 in his written statement contended that the suit land was regranted in his favour after the abolition of Inam or Watan and that he has paid the entire amount of price in respect of the suit land. The Respondent No.1 submitted that neither the Appellants nor the Respondent No.2 have any right, title or interest in the suit land. The case of the Respondent No.2 in his written statement is that after the regrant of the suit land, the Respondent Nos.1 and 2 partitioned the suit land between them and entries to that effect have been made in the revenue record. The Respondent No.2 submitted that the Appellants have no right, title or interest in respect of the suit land.

10. By Judgment and Decree dated 5th February 1979 the learned Trial Judge decreed the suit filed by the Appellants and granted declaration that the Appellants were entitled to one half share in the suit land and that the Respondent Nos.1 and 2 were entitled to one fourth share each in the suit land. Therefore, the learned Trial Judge passed a decree for partition.

11. The Respondents preferred an Appeal before the District Court for taking exception to the decree passed by the Trial Court. By Judgment and Decree dated 10th February 1982 the

learned District Judge, Pune allowed the Appeal and dismissed the suit filed by the Appellants.

12. During the pendency of the suit the original Defendant No.1 Genubhau expired and his legal representatives were brought on record.

13. Shri Adkar the learned Counsel for the Appellants relied upon the Judgments of the Apex Court reported in (1995) 2 Supreme Court cases page No.543 (Annasaheb Bapusaheb Patil and others vs. Balwant @ Balasaheb Babusaheb Patil and others) and (2003) 3 Supreme Court Cases page No.552 (Chandramohan Ramchandra Patil & Others Vs. Bapu Koyappa Patil (Dead) through his LRS). He also relied upon the Judgment of the Apex Court reported in (1982) 2 S.C.C. S.C. page No.79 (Nagesh Bisto Vs. Khando Tirmal). He submitted that till the time the Watan was not abolished by operation of law, by virtue of rule of primogeniture, the suit land was impartible. He submitted that once the Watan was abolished and the suit land was regranted, the suit land became partible property between the members of the family of the Watandar or Inamdar. He invited my attention to various paragraphs of the Judgment of the learned District Judge. He submitted that the learned District Judge was aware about the correct legal position. However, he came to an erroneous conclusion that at the time of death of Gopala, the rule of primogeniture was applicable and the suit land vested in the

Respondent No.1 and therefore, Section 7 of the said Act was not applicable. He submitted that a specific case made out by the Respondent No.1 in the written statement was that the land was regranted after the demise of Gopala. He urged that after the regrant, the members of the joint family were entitled to a share in the suit land. He, therefore, submitted that the entire approach of the District Judge was erroneous. He also invited my attention to the provisions of Section 7 of the said Act. He submitted that in view of clear position of law which is reiterated by the Apex Court in the cases of Annasaheb (supra) and Chandramohan (supra), the Appellant can claim a share in the suit land after abolition of Inam and therefore, the Decree passed by the Trial Court deserves to be restored.

14. Shri Naik the learned Counsel for the Respondents submitted that the Respondent No.1 in his written statement contended that the suit land was of his exclusive ownership. He submitted that no issue has been framed based on the said contention. He invited my attention to certain paragraphs of the Judgment of the Apex Court reported in the case of Nagesh (supra). He submitted that there was a partition of the family property even prior to the year 1937 when Gopala was alive. The Appellants accepted their shares in the partition and therefore the Appellants deemed to have relinquished their shares in the suit land. He submitted that Gopala expired on 25th October 1937 and hence succession had opened

even before coming into force of the said Act. He submitted that even the Apex Court Judgement in the case of Nagesh (supra) carves out an exception in case of express surrender. He submitted that as proper issues were not framed evidence could not be led and therefore, an order of remand deserves to be passed.

15. I have considered the rival submissions. In so far as genealogy of the parties is concerned, there is no dispute. There is also no dispute as regards earlier partition between the members of the joint family. The parties have not controverted the fact that the suit land was not partitioned in the said partition.

16. The learned Trial Judge relied upon the Judgment of this Court reported in LXXV Bombay Law Reporter page No.290 (Dhondi Vithoba Koli Vs. Mahadeo Dagdu Koli). Relying upon the said Judgement the learned Trial Judge held that the abolition of the Watan, the resumption of the Watan land and the regrant thereof does not take away character of the land as Hindu Joint Family Land and it does not become self-acquired property of Watandar-Grantee. The learned Trial Judge did not accept the contention of the Respondents that the suit land was included in the partition as there was no evidence to show that the Appellants were compensated by allotting more area in there favour.

17. The learned District Judge dealt with Section 7 of the said Act and came to the conclusion that the suit land which was vested in the Respondent No.1-Defendant No.1 will not be governed by rules which came into force after Section 7 of the said Act of 1962 was enacted. The learned District Judge held that Bhiku's branch ceased to have any interest in the suit land.

18. The fact that the suit land was ancestral property of the family has not been seriously disputed. The said Act of 1962 came into force with effect from 1st January 1963 and the suit land was regranted on or about 9th April 1966. It is pertinent to note here that in the written statement filed by the Respondent No.1 the specific contention raised is that the suit land was of his exclusive ownership from its inception. In paragraph No.9 of the Judgement of the Trial Court, a clear finding has been recorded that there is no evidence on record to show that taking into consideration the area of the suit land, the Respondents were allotted lesser share in the partition and that the Appellants were allotted larger share. The Trial Court relied upon the admission given by Tukaram-Respondent No.1-C herein that the suit land was the ancestral land and in paragraph No.9 recorded a finding that the suit land was the property of joint family. It is pertinent to note that the finding recorded by the Trial Court in paragraph No.9 has not been set aside by the Appellate Court. All that the Appellate Court held was the

rule which governed succession to the suit land at the time of death of Gopala was the rule of primogeniture and by virtue of the said rule when the suit land vested in the Respondent No.1, the suit land will not be governed by the rule which was enacted after coming into force Section 7 of the said Act. The learned District Judge was impressed by the fact that the succession had opened on the death of Gopala i.e. on 25th October 1937 and rule of primogeniture was governing the succession at that time. The learned District Judge has set aside the decree only on the ground that the Respondent No.1-Defendant No.1 became owner by virtue of rule of primogeniture.

19. The Apex Court in the case of Annasaheb (supra) had an occasion to consider the provisions of the same Act i.e. the said Act of 1962. The Apex Court referred to various provisions of the said Act of 1962 including Sections 3 and 5 of the said Act. In the facts of the case before the Apex Court one Bapu died on 31st October 1956. After his demise, Balwant became the eldest member in the joint family of himself and his brother Anna Saheb. Except the lands in dispute which were watan lands, all other family properties were partitioned. After abolition of the Watan by Section 3 of the said Act, the said Balwant being the eldest member of the family obtained re-grant under Section 5 of the said Act. Thereafater, the said Annasaheb filed a suit for partition. It was decreed by the Trial Court. In the First Appeal

preferred before this Court, it was held that after re-grant under the said Act of 1962, Watan property became personal property of Balwant and was not partible. The Apex Court considered a specific question in paragraph No.5 of the Judgment "Whether on re-grant made under Sub Section 1 of Section 5, the attached Watan lands assumed the character of self-acquired property of Balwant, the Watandar?" A contention before the Apex Court was that re-grant made was personal to the Watandar and therefore by the re-grant the suit land had become personal property of the Watandar i.e. Balwant. The Apex Court noted that when the said Bapu died, right of succession opened on his demise under the law of primogeniture. After referring to the decision in case of Nagesh (supra), in paragraph No.10 of the Judgement the Apex Court held as under :

> . "The same ratio proprio vigore would apply to the facts in this case as well. It is seen that by operation of Section 3 watans have been abolished and all the incidents attached to the watandari including the pre-existing custom, operation of law or any decree or order of the court were nullified by statutory operation. Thereby, the incidents attached to the watan i.e. liability to render service as Patel became extinct and the lands became ryotwari lands, the office of watan stood extinguished, the lineal primogeniture stood abolished and the land on re-grant became the Hindu joint family property held by the watandar for and on behalf of the members of the joint Hindu family. All the members of the family became entitled to claim right to partition by survivorship. The Act had come into force on 1-1-1963 after the Hindu Succession Act, 1956, became operational. Therefore, after the death of the father in 1956, the right to succession as watandar opened to the senior

> lineal male descendant i.e. Balwant as per the existing watan law. The re-grant was made in 1965 in which year the right to claim partition accrued to all the members of the family..."

20. In the subsequent Judgment of the Apex Court in the case of Chandramohan (supra) the Apex Court had an occasion to consider the provisions of Bombay Pargana and Kulkarni Watan (Abolition) Act, 1950. In paragraph No.8 the Apex Court held as under :

> . "...The suit lands held by the erstwhile watandar or inamdar were impartible under the then existing law. The contest inter se for the status of watandar between members of the family ended by order of the Regency Court dated 30-3-1945 and the only result was that the predecessors-in-title of the defendants were allowed to possess the land as watandar being the eldest member of the family of the original watandar on the rule of primogeniture. After the abolition of watan or inam and when a regrant of the land was made to the watandar, the properties came back to the whole body of the joint family of the erstwhile watandar and he then possessed the land for and on behalf of the family. Such lands which were regranted to the watandar became properties returned to the family of the watandar and became partible. The possession of the predecessors-in-title of the defendants pursuant to the order of the Regency Court on 30-3-1945 as watandar cannot be held to be adverse to other members of the family after the abolition of of inams and watans and regrant of those lands to the watandar. The inam and watan lands thus regranted to the watandar enured for the benefit of the whole family of the watandar and it is only thereafter they became partible...."

21. As stated earlier the finding of the Trial Court that there was no partition effected in respect of the suit land has not been set aside by the Appellate Court. The Appellate

Court in paragraph No.12 came to the conclusion that at the time of death of Gopala rule of primogeniture was in force and therefore by virtue of the said rule property came to be vested in the Respondent No.1. In view of clear pronouncement of law by Apex Court in the decisions in the cases of Nagesh, Annasaheb and Chandramohan, the right to claim partition of the suit land accrued to the Appellants when regrant was made under the said Act in the year 1966.

22. There is some substance in the criticism offered by the learned Counsel Shri Naik that there was no specific issue framed on the basis of the contention of exclusive ownership of the Respondent No.1. The Judgment of the Trial Court shows that the Trial court was aware about the said contention which has been dealt with while deciding the Issue No.1 regarding entitlement of the Appellant to seek one half share. The Trial Court has referred to the admission given by Tukaram the son of original Defendant No.1 Genba in his cross examination. In paragraph No.3 of his cross examination, Tukaram has clearly admitted that along with Survey Nos.17 and 18 the suit land bearing No.66 was a family land. It is to be noted here that in Examination-in-chief the said Tukaram stated that the suit land was not ancestral property. In the same Examination-in-chief he further stated that there was a partition between Gopala and Bhiku of the estate which included the suit land. Therefore, in the cross examination and in the later part of the examination-in-chief

itself Tukaram has given up the case that the suit land was not an ancestral property. Therefore, failure to frame any specific issue on this aspect has not resulted in the failure of justice. The parties have led evidence on this aspect and therefore, no case is made out for the remand of the suit to the Trial Court. It is pertinent to note that in the grounds of Appeal before the District Court, no contention has been raised by the Respondents that they could not lead any evidence as proper issues were not framed.

23. In the light of law laid down by the Apex Court in the case of Nagesh (supra) the only thing which is to be seen is whether there is any substance in the contention raised by the learned Counsel Shri Naik regarding surrender of right, title or interest by the Appellants. Whether there was any express or implied surrender by the Appellant or not is a question of fact which requires foundation in the pleadings and evidence. No such contention has been raised by the Respondents either in the pleadings or in the evidence. Therefore, the said case made out cannot be considered at this stage for the first time in the Second Appeal.

24. The learned District Judge has thus committed an error by not considering that after its re-grant the suit land ceased to be of impartible nature and therefore, the members of the family became entitled to seek partition. In this view of the matter, the Judgment of the Appellate Court

deserves to be set aside and the Judgment of the Trial Court deserves to be restored.

25. Accordingly, Second Appeal is allowed. Impugned Judgment of the Appellate Court is quashed and set aside and the Judgement and Decree dated 5th February 1979 passed by the Trial Court is restored. There is no order as to costs.

JUDGE

. At this stage Shri I.M.Khairdi Advocate holding for Shri V.B.Naik prays for stay of the Judgment and Order pronounced today. Considering the facts and circumstances of the case, execution and operation of the Judgment pronounced today will remain stayed for six weeks from today.

JUDGE